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No. 87-1912

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID JOE WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

1308

QUESTIONS PRESENTED

1. Whether a defendant may be separately convicted and sentenced under 18 U.S.C. 2312 for transporting a stolen vehicle in interstate commerce and under 18 U.S.C. (Supp. IV) 2313 for possessing, concealing, selling or disposing of the same stolen vehicle after it crossed a state line.

2. Whether the district court should have declared a mistrial because of a comment made by a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1988. The petition for a writ of certiorari was filed on May 6, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Oklahoma, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of altering motor vehicle identification numbers, in violation of 18 U.S.C. (Supp. IV) 511; three counts of transporting a stolen automobile in

interstate commerce, in violation of 18 U.S.C. 2312; and three counts of possessing, concealing, selling, or disposing of stolen automobiles, in violation of 18 U.S.C. (Supp. IV) 2313. He was also convicted of conspiring to commit those offenses, in violation of 18 U.S.C. 371. He was sentenced to concurrent five-year terms of imprisonment on each count except one of the mail fraud counts. On that count, he was sentenced to three years' imprisonment, to run consecutively to the other sentences. For each of petitioner's 13 convictions, the district court also imposed a $50 special assessment pursuant to 18 U.S.C. (Supp. IV) 3013. The court of appeals affirmed (Pet. App. A1-A19).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A4-A7). It showed that petitioner engaged in a fraudulent scheme that involved disguising and reselling stolen cars. The scheme worked as follows: petitioner purchased salvage vehicles from insurance pools; he removed the vehicle registration numbers from the vehicles; he then obtained stolen cars of similar types; he changed the vehicle identification numbers on the stolen cars to those from the salvaged vehicles; and he then sold the stolen cars to used-car dealers, representing them as "rebuilt" (*id.* at A4-A5). As to each of the three cars on which petitioners' convictions were based, the work petitioner claimed to have done on the car was never performed (*id.* at A7). In connection with his scheme, petitioner would inform Ralph William Crow, a convicted car thief, of the makes of cars petitioner wished to obtain, and Crow would steal the cars (*id.* at A5).

Petitioner sold or consigned each of the three stolen cars involved in this case to Pat Hickey, who transported them from Oklahoma to Fort Smith, Arkansas (Tr. 207, 217, 220, 222). After a time, Hickey sold two of the cars (Tr.

209-218); the third was recovered by its owner while it was at a detail shop being prepared for sale (Tr. 52-58, 220-222).

2. On appeal petitioner contended that he could not be separately convicted and sentenced for transporting a stolen vehicle in interstate commerce and for possessing, concealing, selling, or disposing of the same vehicle after it crossed a state line. The court of appeals rejected that claim, relying on previous Tenth Circuit authority (Pet. App. A13).[1] Petitioner also contended that the district court should have declared a mistrial when Crow testified during direct examination by the government that petitioner was "paying the Sheriff off." The court of appeals held that a mistrial was not necessary in light of the curative instruction given by the district court and in light of the strength of the government's case (*id.* at A18-A19).

ARGUMENT

1. Section 2312 makes it a crime to transport a vehicle in interstate commerce knowing it to be stolen. Section 2313 makes it a crime to receive, possess, conceal, store, barter, sell, or dispose of a vehicle that has crossed a state line after being stolen, knowing it to be stolen. The Section 2312 counts in the indictment charged petitioner with aiding and abetting Hickey in transporting the stolen vehicles from Oklahoma to Arkansas. The Section 2313 counts charged petitioner with aiding and abetting Hickey in possessing, concealing, selling, or disposing of the cars. Petitioner contends (Pet. 9-12) that he could not be

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[1] See *Lindsay* v. *United States*, 134 F.2d 960, 961-962 (10th Cir.), cert. denied, 319 U.S. 763 (1943); *Jackson* v. *Hudspeth*, 111 F.2d 128, 129 (10th Cir. 1940); *Chrysler* v. *Zerbst*, 81 F.2d 975, 976 (10th Cir. 1936).

separately convicted and sentenced under Sections 2312 and 2313.[2]

The issue that petitioner raises has been frequently litigated in the courts of appeals, and an unbroken line of decisions spanning more than 60 years has rejected petitioner's position. See *United States* v. *Spudic*, 795 F.2d 1334, 1340-1342 (7th Cir. 1986); *United States* v. *Sanders*, 538 F.2d 695 (5th Cir.), cert. denied, 429 U.S. 985 (1976); *United States* v. *Neighbors*, 515 F.2d 796, 797 (8th Cir. 1975); *United States* v. *Marvel*, 493 F.2d 15 (5th Cir. 1974); *United States* v. *Ploof*, 464 F.2d 116, 120 (2d Cir.), cert. denied, 409 U.S. 952 (1972); *United States* v. *Thompson*, 442 F.2d 1333 (6th Cir. 1971); *United States* v. *Stone*, 411 F.2d 597, 599 (5th Cir. 1969); *Strother* v. *United States*, 387 F.2d 385 (5th Cir. 1967), cert. denied, 391 U.S. 971 (1968); *United States* v. *Linkenauger*, 357 F.2d 925 (6th Cir. 1966); *United States* v. *Lankford*, 296 F.2d 34, 36 (4th Cir. 1961); *Woody* v. *United States*, 258 F.2d 535 (6th Cir. 1957), aff'd by an equally divided Court, 359 U.S. 118 (1959); *Austin* v. *United States*, 224 F.2d 273 (6th Cir.), cert. denied, 350 U.S. 865 (1955); *Madsen* v. *United States*, 165 F.2d 507 (10th Cir. 1947); *Spradley* v. *United States*, 162 F.2d 203 (6th Cir. 1947); *Pifer* v. *United States*, 158 F.2d 867 (4th Cir. 1946), cert. denied, 329 U.S. 815 (1947); *Batson* v. *Squier*, 146 F.2d 264 (9th Cir. 1944);

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[2] Although petitioners' prison terms for each Section 2312 conviction and each Section 2313 conviction are concurrent, the district court's imposition of a $50 special assessment on each count precludes application of the concurrent sentence doctrine. *Ray* v. *United States*, No. 86-281 (May 18, 1987). Even if petitioner were successful in his claim that he may not be convicted on both the Section 2312 counts and the Section 2313 counts, however, his eight-year term of imprisonment would not be affected; the only effect of a ruling in his favor on that point would be to reduce by $150 the total amount of the special assessment he must pay under 18 U.S.C. (Supp. IV) 3013.

Lindsay v. *United States, supra*; *Record* v. *Hudspeth*, 126 F.2d 215 (10th Cir.), cert. denied, 316 U.S. 703 (1942); *Jackson* v. *Hudspeth, supra*; *Doll* v. *Johnston*, 95 F.2d 838 (9th Cir.), cert. denied, 304 U.S. 574 (1938); *Chrysler* v. *Zerbst, supra*; *York* v. *United States*, 299 F. 778 (6th Cir. 1924); see also *United States* v. *Wolf*, 813 F.2d 970, 978 (9th Cir. 1987).

The legality of separate punishment for multiple offenses turns on congressional intent. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 861 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 365-368 (1983). The court below correctly determined that Congress intended to authorize separate punishments for violations of Sections 2312 and 2313.

If two offenses are charged in different statutes or in distinct sections of a statute, and each section unambiguously authorizes punishment for a violation of its terms, it is ordinarily to be inferred that Congress intended to authorize separate punishment. See *Albernaz* v. *United States*, 450 U.S. 333, 336 (1981); *United States* v. *Marrale*, 695 F.2d 658, 662 (2d Cir. 1982), cert. denied, 460 U.S. 1041 (1983). Here, Sections 2312 and 2313 are separate statutes, and each contains a separate penalty provision.

The usual standard for determining if the legislature intended to authorize separate punishment under two statutes is "whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). One can of course "conceal," "store," "barter," "sell," or "dispose of" a stolen vehicle that has crossed a state line without having participated in the interstate transportation; conversely, one can transport a stolen vehicle in interstate commerce without concealing, storing, bartering, selling, or disposing of it once it has crossed a state line. And typically a person transporting a vehicle in interstate commerce will already

have received it by the time he crosses a state line; accordingly, receipt under Section 2313 is not implicit in transportation under Section 2312. The converse is also true: one can receive a stolen vehicle that has crossed a state line without having participated in any way in its transportation.

Of the various acts prohibited by Section 2313, only "possession" is ordinarily involved in the transportation itself; a person who transports a stolen vehicle across a state line often possesses the vehicle in the destination state. It is possible, however, to cause the interstate transportation of a vehicle without having either actual or constructive possession of the vehicle in the destination state—for example, a person may induce a third party to transport the vehicle but may lose dominion and control over the vehicle when the third party takes possession of it. Therefore, even in the case of possession, the *Blockburger* test is satisfied: a person can possess a stolen vehicle without transporting it or causing its transportation, and a person can cause the transportation of a stolen vehicle without possessing it in the destination state.

Even apart from the *Blockburger* test, the offenses of possession and transportation are separate, at least in circumstances such as those in this case. Even if one possesses a stolen vehicle throughout its interstate transportation, one can continue to possess the vehicle in violation of Section 2313 after its movement in interstate commerce has come to a halt and the Section 2312 offense is complete. And it has been held that possession under Section 2313 is a separate offense from transportation under Section 2312 when the possession extends "beyond the time necessary to complete the offense of transporting the [vehicle] in [interstate] commerce." *United States* v. *Wolf*, 813 F.2d at 978. That was precisely the case here. After the cars reached their destination in Fort Smith, Arkansas, they remained in Hickey's possession for a

period of time as he had them prepared for sale and tried to sell them (Tr. 209-222). Because Hickey and petitioner were accomplices, Hickey's possession was attributable to petitioner.

Finally, the two statutes serve different objectives. Section 2312 is directed solely against those who transport stolen vehicles in interstate commerce. Section 2313, on the other hand, is directed at acts—such as concealing, bartering, storing, and selling—that are separate from and in addition to interstate transportation, and that normally would require a criminal impulse different from the act of transporting. That distinction between the objectives of the two statutes was sharpened by the amendment of Section 2313 in 1984.[3] Previously, the statute required that the prohibited acts be committed while the vehicle was moving in interstate commerce.[4] See, *e.g.*, *United States* v. *Thomas*, 676 F.2d 239, 242 (7th Cir. 1980), cert. denied, 449 U.S. 1091 (1981); *United States* v. *Hiscott*, 586 F.2d 1271, 1274 (8th Cir. 1978); *United States* v. *Hall*, 455 F.2d 492, 493 (5th Cir.), cert. denied, 406 U.S. 927 (1972). Now, as a result of the amendment, the statute reaches conduct committed any time after the car has crossed a state line, even if it has come to a stop and is no longer in the stream of interstate commerce. Accordingly, under the old statute violations of Sections 2312 and 2313 would always occur simultaneously; under the amended statute, that need not necessarily be the case.

This Court previously considered the issue whether separate sentences may be imposed for violations of

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[3] It is the amended version of the statute that applies to this case. Each substantive offense alleged in the indictment occurred in 1985.

[4] The statute formerly made it a crime to commit the specified acts with respect to a car "moving as, or which is a part of, or which constitutes interstate * * * commerce" (18 U.S.C. 2313).

Sections 2312 and 2313 in *Woody* v. *United States*, 359 U.S. 118 (1959). There, the court of appeals decision upholding separate sentences was affirmed by an equally divided Court. There is, however, no need for the Court to revisit the issue here in light of the unanimity of the court of appeals decisions in this area both before and after *Woody*, and in light of the 1984 amendment of Section 2313.

2. Ralph Crow testified for the government at trial. During his direct examination, the following exchange took place (Pet. App. A14):

> Q. Did you ever discuss with David Ward the business of Jerry Grist?
>
> A. We talked a little bit about it. When I first starting dealing with David I didn't know he really had a lot to do with Grist.
>
> Q. How did you find out to the contrary?
>
> A. Well, through dealing with all three of the men, I found out that they were paying the Sheriff off, and—

Petitioner immediately moved for a mistrial, and the district court denied the motion. Petitioner contends (Pet. 13-25) that that ruling was error.

It is well settled that the question whether a mistrial should be granted is within the sound discretion of the district court. Here, the court of appeals correctly concluded (Pet. App. A18-A19) that it was not an abuse of discretion for the district court to deny the motion for a mistrial.

First, the district court promptly gave a curative instruction in which it told the jurors that Crow's statement was "absolutely irrelevant" and that they should not consider it in deciding the case (Pet. App. A15). It is normally presumed that a jury will follow an instruction to

disregard inadmissible evidence. *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9 n.8; *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6-7, 10. Second, as the court of appeals held (Pet. App. A18), the government's case was sufficiently strong that there could be "no reasonable doubt that the jury would have reached the same verdict in the absence of the improper testimony." Finally, this is not a case in which the improper testimony was deliberately elicited by the government; Crow's comment was unresponsive to the prosecutor's question, as the district court explicitly found (*id.* at A14, A15). In these circumstances, there was no need for a mistrial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

JULY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60551